Saipem (M) Sdn Bhd & Anor v AG & P (M) Sdn Bhd (In liquidation) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-24-127-1993
RICHARD TALALLA J
4 SEPTEMBER 1995

Civil Procedure *— Originating summons —Withdrawal of claim — Leave of court not obtained — Whether valid — Rules of the High Court 1980 O 21 r 3(1)*

Companies and Corporations *— Winding up — Undue preference — Settlement agreement entered into by company — Money set aside for certain creditors of company — Company wound-up — Whether transaction void as against liquidator of company — Companies Act 1965 s 223 — Bankruptcy Act 1967 s 53(1)*

Trusts and Trustees *— Trusts — Settlement — Construction — Money set aside for certain creditors of company — Company wound up — Whether trust created — Whether other creditors excluded from claiming money set aside*

By a settlement agreement ('the agreement') between Saipem (M) Sdn Bhd ('the first plaintiff'), Saipem SPA (a company incorporated in Italy), and AG & P (M) Sdn Bhd ('the first defendant'), the parties to the agreement settled certain legal disputes involving themselves. By the agreement, the first plaintiff was to take over the obligations of the first defendant in exchange for the first plaintiff obtaining certain benefits provided in the agreement. By the agreement, the first plaintiff was also to place a certain sum of money in an interest-bearing account in the joint names of the solicitors acting for the first plaintiff and the first defendant. The money was to be held on trust for paying debts owing to the identified creditors of the first defendant, and the remainder, if any, on trust for the first plaintiff. Later, further disputes arose between the first plaintiff and the first defendant regarding some payments to certain identified creditors. At that time, there was a balance sum of RM573,340.92 in the interest-bearing account, and RM43,435.64 in another current account. The first plaintiff with the support of the first defendant, applied by originating summons for an order from the court, inter alia, that: (i) the sums in the deposit and the current accounts be returned to the first plaintiff; and (ii) the solicitors to the first plaintiff and the first defendant, who were the joint account-holders in respect of the money, should release to the first plaintiff all money remaining in the deposit account, upon the payment to all the identified creditors. By the time the originating summons was filed, the first defendant had been wound-up upon a petition presented by the third defendant, who was a creditor of the first defendant. It was the contention of the plaintiffs that a trust had been established for the sole purpose of paying third party creditors, and that upon fulfilment of that trust, any money left in the accounts was to be held in trust for the first plaintiff. However, if such an argument was accepted, the remaining

money would not have been available to meet the claims of unsecured creditors of the first defendant who had not been identified in the agreement, and had proven in the winding up the debts owing to them. The third defendant had opposed the application, but later withdrew all claims in respect of the said money.

Held, dismissing the application:

(1) There was no trust in favour of the first plaintiff in respect of money remaining in the accounts after payment of sums due to the identified creditors (see p 246H–I); *Rothmans Ltd v Freeman Mathews Treasure Ltd (In liquidation) & Anor* [1985] 1 All ER 155, and *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 distinguished.

(2) The money advanced by the first plaintiff to the first defendant for the purpose of paying identified creditors of the first defendant was money to which the identified creditors could make no claim in law. The money could not be said to be held on trust for the identified creditors (see p 247A–D); *Rothmans Ltd v Freeman Mathews Treasure Ltd (In liquidation) & Anor* [1985] 1 All ER 155, and *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 distinguised.

(3) The settlement agreement constituted a conveyance, or transfer of property, of the first defendant within the meaning of s 53 of the Bankruptcy Act 1967 at a time when it was unable to pay its debts, and it was made within a period of less than six months before the commencement of the winding up. It was, therefore, void as against the official receiver who was the provisional liquidator of the first defendant (see pp 249–250); *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 followed.

(4) The withdrawal of the claim by the third defendant was invalid as the leave of the court to such withdrawal had not been obtained (see p 247E–F).

[Bahasa Malaysia summary

Melalui suatu perjanjian penyelesaian ('perjanjian tersebut') di antara Saipem (M) Sdn Bhd ('plaintif pertama'), Saipem SPA (sebuah syarikat yang ditubuhkan di Itali), and AG & P (M) Sdn Bhd ('defendan pertama'), pihak–pihak kepada perjanjian tersebut telah menyelesaikan suatu pertikaian undang–undang antara mereka. Melalui perjanjian tersebut, plaintif pertama akan mengambil alih obligasi defendan pertama, dan sebagai gantian, plaintif pertama akan memperolehi faedah tertentu yang telah diperuntukkan dalam perjanjian tersebut. Mengikut perjanjian terebut, plaintif akan memasukkan sejumlah wang tertentu ke dalam suatu akaun berfaedah atas nama bersama peguamcara-peguamcara yang mewakili plaintif pertama dan defendan pertama. Wang tersebut akan dipegang atas

amanah untuk menjelaskan hutang kepada pemiutang defendan pertama yang dikenal pasti, dan jika terdapat baki, atas amanah untuk plaintif pertama. Kemudiannya, pertikaian selanjutnya timbul antara plaintif pertama dengan defendan pertama mengenai bayaran kepada pemiutang tertentu. Pada masa itu, terdapat juga baki sebanyak RM573,340.92 dalam akaun berfaedah tersebut, dan jumlah sebanyak RM43,435.64 dalam suatu akaun semasa. Plaintif pertama, dengan sokongan defendan pertama, memohon menerusi saman pemula untuk suatu perintah daripada mahkamah, antara lain, supaya: (i) jumlah wang dalam akaun deposit dan akaun semasa dikembalikan kepada plaintif pertama; dan (ii) peguamcara-peguamcara bagi plaintif pertama dan defendan pertama, yang merupakan pemegang bersama akaun wang itu, melepaskan semua baki wang dalam akaun deposit kepada plaintif pertama selepas pembayaran dijelaskan kepada kesemua pemiutang yang telah dikenal pasti. Apabila saman pemula difailkan, defendan pertama telah digulung menerusi suatu petisyen yang telah disampaikan oleh defendan ketiga, yang merupakan pemiutang defendan pertama. Plaintif-plaintif berhujah bahawa suatu amanah telah diwujudkan bagi tujuan membayar pemiutang-pemiutang pihak ketiga, dan bahawa selepas amanah tersebut dipenuhi, sebarang baki dalam akaun tersebut akan dipegang atas amanah untuk plaintif pertama. Walau bagaimanapun, jika hujah sebegini diterima, baki wang itu tidak boleh digunakan untuk memenuhi tuntutan daripada pemiutang tak bercagar defendan pertama yang tidak dikenal pasti dalam perjanjian tersebut dan yang telah membuktikan jumlah yang terhutang kepada mereka dalam penggulungan. Defendan ketiga telah menentang permohonan itu, tetapi kemudiannya telah menarik balik segala tuntutan berkaitan dengan wang tersebut.

Diputuskan, menolak permohonan itu:

(1) Tidak terdapat amanah bagi pihak plaintif pertama berkaitan dengan baki wang dalam akaun-akaun itu selepas pembayaran jumlah yang patut kepada pemiutang yang telah dikenal pasti (lihat ms 246H–I); *Rothmans Ltd v Freeman Mathews Treasure Ltd (In liquidation) & Anor* [1985] 1 All ER 155, dan *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 dibeza.

(2) Bayaran pendahuluan yang diberi oleh plaintif pertama kepada defendan pertama untuk tujuan membayar pemiutang defendan pertama yang telah dikenal pasti adalah wang yang tidak boleh dituntut oleh pemiutang tersebut dari segi undang-undang. Wang itu tidak boleh dikatakan dipegang dalam amanah untuk pemiutang yang telah dikenal pasti (lihat ms 247A–D); *Rothmans Ltd v Freeman Mathews Treasure Ltd (In liquidation) & Anor* [1985] 1 All ER 155, dan *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 dibeza.

(3) Perjanjian penyelesaian tersebut merupakan suatu pemindahhakan atau pindahmilik hartanah defendan pertama dalam maksud s 53

Akta Kebankrapan 1967 pada masa ia tidak dapat menjelaskan hutangnya, dan ia telah dibuat dalam satu tempoh masa yang kurang daripada enam bulan sebelum permulaan penggulungan. Oleh itu, ianya terbatal terhadap pegawai penerima yang merupakan penyelesai sementara defendan pertama (lihat ms 249–250); *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 diikut.

(4) Penarikan tuntutan oleh defendan ketiga adalah tidak sah kerana kebenaran mahkamah terhadap penarikan yang berkenaan belum didapatkan (lihat ms 247E–F).

[*Editorial note* : The first and the second plaintiffs have appealed to the Court of Appeal vide Civil Appeal No W–02–395–95.]

Notes

For cases on originating summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2334–2351.

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

For cases on trusts and trustees, see 12 *Mallal's Digest* (4th Ed) paras 889–1165; [1989] Mallal's Digest 1535–1541; [1990] Mallal's Digest 1212–1218; [1991] Mallal's Digest 2007–2017; [1992] Mallal's Digest 1714–1722; [1993] Mallal's Digest 1336–1348; [1994] Mallal's Digest 2210–2226.

Cases referred to

Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (In liquidation) & Anor [1985] 1 All ER 155

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567

British Eagle International Airlines Ltd v Cie Nationale Air France [1975] 2 All ER 390

Rondel v Worsley [1969] 1 AC 191

Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449

Legislation referred to

Bankruptcy Act 1967 ss 2, 53

Companies Act 1965 ss 218, 223 & 293

Rules of the High Court 1980 O 21 r 3(1)

Meera Samanthar (*Shearn Delamore & Co*) for the first and second plaintiffs.

Charanjeet Kang (*Skrine & Co*) for the second defendant.

Paul Ong (*Paul Ong & Associate*) for the third defendant.

Azman Aiyub (Official Receiver)

Cur Adv Vult

Richard Talalla J: By an application by originating summons ('the originating summons') dated 19 July 1993, the plaintiffs are, inter alia, seeking a declaration of this court as to whether the balance of money held by the second plaintiff ('Shearn') and second defendant ('Skrine') under a joint current account ('the current account') and joint fixed deposit account ('the deposit account') pursuant to the provisions of a settlement agreement ('the settlement agreement') dated 24 January 1991 between the first plaintiff ('Saipem') of the first part, Saipem SPA, a company incorporated in Italy ('SSPA') of the second part (not a party to the originating summons) and the first defendant ('AG & P') of the third part are held in trust for paying the creditors of AG & P, as identified in the settlement agreement ('the identified creditors') and the remainder, if any, on trust for Saipem.

SSPA, Saipem and AG & P had entered into several agreements and by those agreements, they had agreed to undertake the performance and completion of the fabrication and installation of the second E11 trunkline and associated facilities at E11R-A and the MLNG plant, Bintulu ('the project works') on a joint venture basis. By a contract No 100776 ('the Shell contract') dated 22 December 1989, both Saipem and AG & P jointly and severally agreed to undertake the project works for Sarawak Shell Berhad for the consideration and upon the terms and conditions set out in the Shell contract. Differences arose between Saipem and AG & P in respect thereto. AG & P obtained an injunction dated 30 October 1990 from the court restraining SSPA and Saipem, inter alia, from dealing with money paid by Sarawak Shell to SSPA and Saipem under the Shell contract up to a sum of RM12,557,776.26 without the consent of AG & P or leave of the court. Subsequently, the parties, being desirous of an amicable settlement, entered into the settlement agreement.

The settlement agreement effectively provided for Saipem to take over the obligations of AG & P under the Shell contract, in exchange for Saipem having the benefits therein provided upon terms which included a certain sum to be placed by Saipem into an interest-bearing account in the joint names of Shearn and Skrine, who were the solicitors for Saipem and AG & P respectively, to be held for settling the identified creditors. The maximum sum was RM2,292,853.57 subject to verification by Saipem and the amounts verified were to be paid out of the account. Saipem paid a total sum of RM1,581,253.47 out of its own funds directly to some of the identified creditors; and paid a total sum of RM724,530.69 out of the deposit account and current account to the rest of the identified creditors; and obtained a discharge of a total sum of RM527,611.49 from those identified creditors who were paid. Disputes also arose between Saipem and AG & P in respect of some of the payments to the identified creditors in the sum of RM88,457.92. There was a balance sum of RM573,340.92 as at 29 June 1993 in the deposit account and RM43,435.65 as at 31 May 1993 in the current account.

Saipem and Shearn seek a declaration from the court that:

(a) the sum of RM88,457.92 be kept aside pending the resolution of the claims of some of the identified creditors;

(b) the balance sum of RM439,206.53 in the deposit account and the current account be returned to Saipem; and

(c) Shearn and Skrine shall, upon due payment to all the identified creditors, release all money remaining in the deposit account and current account to Saipem.

On 14 November 1991, AG & P was wound up by the court upon a petition preferred unto court by the third defendant ('SS Huat') and the official receiver was appointed as the provisional liquidator of AG & P. The petition was filed in consequence of AG & P's failure to comply with a notice by SS Huat issued pursuant to s 218 of the Companies Act 1965 ('the 1965 Act'), the said notice having been issued by reason of AG & P's failure to pay a judgment debt owing by them to SS Huat.

Counsel for the plaintiffs, with the consent of counsel for Skrine, argued for the said money to be paid to Saipem. In support of that argument, counsel for the plaintiffs relied on two cases, namely, *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (In liquidation) & Anor* [1985] 1 All ER 155, and *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, the facts of which I shall set out seriatim.

In the first mentioned case, the plaintiff, Carreras Rothmans Ltd ('CR') was the manufacturer of several well-known brands of cigarettes and pipe tobacco. In carrying on its business, it advertised extensively in the United Kingdom. CR employed Freeman Mathews Treasure Ltd ('FMT') to carry out its advertising. FMT did both the creative work and the placement work for CR. Placement work included negotiation with the media and assessing the quality of the media whose space was being bought for the advertisements. A monthly fee was paid by CR to FMT. In addition, CR paid FMT a sum equal to all expenditure incurred by FMT on the placement work which it carried out for CR, such payment being limited to debts incurred to third parties. The third parties were newspapers and periodicals in whose publications CR's advertisements appeared and production agencies who performed technical services to enable FMT to supply the newspapers and periodicals with the actual advertisements to be printed. The obligations incurred to such third parties were incurred by FMT as principal and not as agent of CR, although the third parties would have been well aware that they were working on advertisements for CR. In 1982, FMT was subject to financial pressures and desperate attempts were made to find capital. In view of this, CR was concerned that large sums of money that it had been putting through FMT should be protected. CR was also concerned at the damage that might be caused to it if FMT ceased trading through insolvency leaving the third party creditors with their debts unpaid. Hence, a scheme was devised in order to protect the interests of CR and the media creditors, whereby a special account was set up under the title 'FMT/Carreras Rothmans client account,' ('the account'). CR was to pay money into the account. The money in the account was to be used only for the purposes of meeting the accounts of the media and production fees of third parties directly attributable to CR's involvement with FMT. It was also agreed that, in the event of any balance occurring

in the account after payment to the third parties, such sum balance would be paid to CR, though this was envisaged never to occur in the usual course of things. On 3 August, FMT went into a creditors' voluntary winding up and the money in the special account was frozen at the instruction of the liquidator, and all cheques drawn on the special account were dishonoured. CR decided that the second phase of its huge advertising campaign was too important to jeopardize, and accordingly paid FMT's debts to third parties. The payments made by CR to third parties were made against assignments by the third parties to CR, thereby enabling CR to stand in the shoes of the third parties as far as any claim could be made against the money in the special account, or to prove in the liquidation. It was held by the court that, the money payable by CR was to be paid not to FMT beneficially but directly into the special account so that FMT was never free to deal as it pleased with the money so paid. The money was to be used only for the specific purpose of paying the third parties. The account was intended to be little more than a conduit pipe, but the intention was plain that, whilst in the conduit pipe, the money should be protected. In *Carreras Rothmans Ltd*, at p 164 Peter Gibson J, after reviewing the various features of the payment scheme, held:

> It was thus clearly intended that the money once paid would never become the property of FMT. That was the last thing CR wanted in view of its concern about FMT's financial position. As a further precaution the bank was to be put on notice of the conditions and purpose of the account. I infer that this was to prevent the bank attempting to exercise any rights of set-off against the money in the account. ... In any judgment even in the absence of authority, it is manifest that FMT was intended to act in relation to those money in a fiduciary capacity only.

At p 167, his Lordship held:

> In my judgment, therefore, a trust was created by the July agreement, that trust was completely constituted by the payment of money into the special account and CR as the provider of the money has an equitable right to an order for the carrying out by FMT of the trust.

The court then went on to consider whether the agreement between CR and FMT violated the principle of equal distribution between creditors, and whether the agreement constituted an unregistered charge on book debts in favour of particular creditors and was, therefore, void. In the course of deciding the issues, his Lordship referred to the House of Lords' decision, in *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, and extracted the following principle therefrom, at p 168:

> ... Where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in accordance with s 302 [UK Companies Act 1948: So far as material provides: 'Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities pari passu...'], then to that extent the contract as a matter of public policy is avoided, whether or not the contract was entered

> into for consideration and for bona fide commercial reasons and whether or not the contractual provision affecting that asset is expressed to take effect only on insolvency.

His Lordship then applied the above principle to the facts, and held that the money in the special account, being subject to a trust, was not an asset of FMT at the date of liquidation and was, therefore, not available for distribution to the general body of creditors.

In the other case referred to by counsel for the plaintiff, *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567, the facts were that, R Ltd, who was in serious financial difficulties, obtained a loan from the respondents ('Quistclose') on the agreed condition that it would be used to pay an ordinary share dividend which was declared earlier. Quistclose's cheque was paid into a separate account opened specially for the purpose with the appellant ('Barclays Bank'), who knew that the money was borrowed, and who agreed with R Ltd that the account would only be used for the purpose of paying the dividend. Before the dividend could be paid, however, R Ltd went into voluntary liquidation. The decision of the Court of Appeal was affirmed by the House of Lords. At p 581, Lord Wilberforce in stating the view of the House, said thus:

> ... when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose applied for the primary designated purpose (see *Re Rogers, ex p Holland and Hannen* (1891) 8 Morr 243 CA, where both Lindley LJ and Kay LJ recognized this): when the purpose has been carried out (ie, the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (ie, repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case, the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

The plaintiffs' submission was that, the same principle that applied in the two cases abovestated should apply here, as a trust had been established by the fact that money was placed solely by Saipem into a special account, held jointly by the respective solicitors, for the sole purpose to pay third party creditors and that upon fulfilment of that trust, any money left in the account was to be held on trust for Saipem, as specified in cl 1(d) of the settlement agreement.

A perusal of the said cl 1(d) discloses no such specification. However cl 1(c) of the settlement agreement provided that all balance money in the account, which I take to be the deposit account and the current account, after payment of all money payable pursuant to cl 1(a), which upon perusal provided for payment to the identified creditors, be paid by the

solicitors, which I take to be Shearn and Skrine, from the account to Saipem. A reading of all the provisions of the settlement agreement discloses that, unlike the *Carreras* case abovestated where no consideration passed to CR from FMT or any other person, CR having acted gratuitously and not entered into legal relations with anyone, or the *Quistclose* case where money was advanced in trust for a primary designated purpose which failed thus giving rise to a secondary trust for the benefit of the lender, Saipem advanced the money to pay the identified creditors in consideration of AG & P assigning to Saipem all AG & P's rights and interests in certain purchase orders and the Shell contract. It had to follow that the plaintiffs could not rely on the *Carreras* and *Quistclose* cases to support their application. It had to follow also that the money could not be said to be held on trust for the identified creditors who could make no claim in law in respect of the same but rather that the money was held by Shearn and Skrine pursuant to a bargain between Saipem and AG & P embodied in the settlement agreement, whereunder the consideration moving to Saipem was as stated above that is, AG & P's rights and interests in the purchase orders and the Shell contract. The two cited cases, therefore, had to be treated as not supporting the plaintiffs' case.

At the hearing of the originating summons on 30 June 1994, counsel for SS Huat had opposed the application. Hearing was then adjourned to 8 September 1994. However, on 5 September 1994, the solicitors for SS Huat filed a notice of withdrawal purporting to withdraw all claims by SS Huat in respect of the said money. It is provided in O 21 r 3(1) of the Rules of the High Court 1980, inter alia, that a party may not discontinue an action (whether begun by writ or otherwise) or withdraw any particular claim made by him therein, without the leave of the court. SS Huat did not obtain the leave of the court to withdraw its claim in respect of the moneys. Therefore, their withdrawal was invalid. When hearing of the originating summons resumed on 8 September 1994, counsel for SS Huat appeared and sought an order that the solicitors be discharged from acting for SS Huat, stating that the said solicitors could not agree with the stand that had been taken by SS Huat in withdrawing its claim. I declined to discharge the solicitors as I found the situation perplexing. I then requested counsel for SS Huat to invite Mr Paul Ong, the senior partner in the firm of solicitors on record as acting for SS Huat to appear as *amicus curiae* to explain the situation. On 28 September 1994, when hearing of the originating summons resumed, Mr Ong did appear. Mr Ong informed me that his advice to SS Huat had always been to oppose the originating summons. SS Huat accepted his advice but later specifically instructed him not to object to the application. Accordingly, Mr Ong sought to withdraw his firm as solicitors acting for SS Huat in the proceedings. He had then come to court as *amicus curiae* to show why the originating summons should not be allowed, as invited by me. In turn, I expressed appreciation at Mr Ong's appearance adding that counsel's principal duty is to the court and then only to the client: see Lord Reid in *Rondel v Worsley* [1969] 1 AC 191. Mr Ong's submission was that, the settlement agreement is void against the official receiver because it falls within the

ambit of ss 293 and 223 of the 1965 Act read with s 53 of the Bankruptcy Act 1967 ('the 1967 Act'). Section 293 of the 1965 Act reads as follows:

> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.
>
> (2) For the purposes of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —
>
> (a) in the case of a winding up by the court -
>
> (i) the date of the presentation of the petition; or
>
> (ii) ...
>
> (b) ...
>
> (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

The provision under the law of bankruptcy to be read together with the above section is s 53 of the 1967 Act which is as follows:

> (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the official assignee.

Section 223 of the 1965 Act provides as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the court otherwise orders be void.

In the case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, the Supreme Court had to decide, inter alia, whether or not certain transfers of property to certain persons constituted fraudulent or undue preference to certain creditors. In so deciding the issue, Seah SCJ (with whom the other two SCJJ concurred) held at p 452 as follows:

> In my opinion, s 53 of the Bankruptcy Act 1967 (as amended) is imported into a winding up proceeding of a company by s 293(1) of the Companies Act 1965 ... In short, the rules of bankruptcy as to fraudulent preference are applied to the winding up of the company by the court by s 293(1)...

A Further, at p 453, his Lordship continued thus:

> ... s 53(1) renders void as against the Official Assignee a transfer of property, by a person who is unable to pay his debts as they become due from his own money, in favour of a creditor as this transfer shall be deemed as giving that creditor a fraudulent preference over the other creditors if that person is adjudged a bankrupt within six months after the making of the transfers.

B

As to what is meant by the phrase 'within six months after the making of the transfers' in s 53(1) of the 1967 Act, his Lordship held thus at p 455:

> .. the expression 'within six months after the date of making (the transfers)' in s 53(1) is capable of being construed to mean: (a) before the expiration
C of six months after the date of making the transfers; or (b) during the period of six months after the date of making the transfers.
>
> I would prefer construction (a) which would have the effect of preventing any mischief which a bankrupt might be thinking of doing between the period of the presentation of the bankruptcy petition and the making of the adjudication order by the court.

D

As to whether there was a transfer of property, counsel for the plaintiffs in a further written submission to the court stated as follows:

> No assets of AG & P were at any time transferred to Saipem pursuant to the settlement agreement or otherwise. The settlement agreement is not void merely because it provided for the contingent transfer of assets. The fact of
E the matter is that no assets were transferred pursuant to it. If no assets were transferred pursuant to the settlement agreement to Saipem, then under no circumstances could the settlement agreement be construed to infringe s 53 of the Bankruptcy Act 1967 ... As such, I believe that fundamentally there is no dispute between Mr Ong and I on the law and the interpretation of s 53 of the Bankruptcy Act 1967. Had assets been transferred to Saipem as
F a creditor of AG & P pursuant to the settlement agreement as Mr Ong had erroneously assumed, I would agree with him that it would be void.

In s 2 of the 1967 Act, the word 'property' is defined as follows:

> 'property' includes money, goods, things in action, land and every description
G of property, whether real or personal and whether situate in Malaysia or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

The word 'property' has thus been given a wide meaning. In my view, the assignment of AG & P's rights and interests in the purchase orders and the
H Shell contract by AG & P to Saipem constitutes a transfer of property within the meaning of s 53 of the 1967 Act.

Counsel for the plaintiffs finally submitted that, in view of the fact that SS Huat had withdrawn all claims to the money as evidenced by the notice of withdrawal, the liquidator of AG & P had not filed any affidavit
I opposing Saipem and Shearn's application, and that Skrine having consented to the application, the court should allow the plaintiffs' application. I demurred. A paramount consideration was the interest of the unsecured creditors proving in the liquidation.

Applying the principles and test abovestated to the facts of this case, I was satisfied that:

(a) there was, to use the language of the legislation abovestated, a conveyance or transfer of property or payment made in that pursuant to various clauses in the settlement agreement: (i) AG & P agreed to dissolve the injunction granted to it on 30 October 1990 against Saipem preventing Saipem from utilizing, making use of, disbursing from or howsoever dealing with money paid under the Shell contract up to a maximum of RM12,557,776.26 without leave of court or the consent of AG & P; and (ii) AG & P permitted Saipem to take possession of the project works together with all plant and materials on the site;

(b) the transfer of property or payment was, using again the same language, suffered by a person unable to pay his debts, as they became due, from his own money, as the facts clearly showed that AG & P had identified creditors under the settlement agreement amounting to RM2,921,853.57, and in addition supporting creditors at its winding up amounting to RM1.7 million;

(c) the transfer or payment was in favour of none other than Saipem itself who was a creditor of AG & P to the extent of RM662,767.48 and was named as one of the identified creditors in the settlement agreement;

(d) the commencement of winding up was made within 6 months after the date of making the transfer in that the settlement agreement was made on 24 January 1991 and the winding up commenced on 11 April 1991, bringing it well within construction (a) as expounded by the then Supreme Court in *Lian Keow Sdn Bhd (In liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449.

As such, I ordered that the originating summons be dismissed and that the plaintiffs do pay the costs of the solicitors for SS Huat such costs to be taxed, and that as between the plaintiffs and Skrine there be no order as to costs. In making the order relating to costs, I took the view that the solicitors and counsel representing SS Huat had, at all times, acted properly and within the scope of their duty as such. It had to be remembered that their principal duty was to the court, and that there was a public element involved, for if the application had been allowed the money would have gone to the plaintiff and not to the official receiver for distribution to creditors in the normal way. Skrine at all times supported the application, notwithstanding being present and hearing the vigorous argument against the application being allowed. Therefore, they could not be allowed costs.

Application dismissed.

Reported by PS Ranjan